IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 697 of 1985

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNION BANK OF INDIA

Versus

RUBI FOOD PACHERS

Appearance:

1. First Appeal No. 697 of 1985
MR ARUN H MEHTA for Petitioner No. 1
DELETED for Respondent No. 1-3
MS DISHA NANAVATI WITH MR ND NANAVATI
for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 10/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. The appellant- original plaintiff filed a suit to obtain a decree for Rs.3,34,314.67 from the person and property of defendants and interest thereon. The appellant also prayed for preliminary decree for equitable mortgaged property which is under the charge of plaintiff and mentioned in Schedule 'A' attached to the plaint.

2. The Special Civil Suit No.142 of 1981 was decided by learned Civil Judge (Senior Division) Junagadh who ordered that the plaintiff do recover an amount of Rs. 3,34,314.67 from the person and property of the defendants no. 1,2 and 3 and also from the property bearing E.P.No. 428 and 436 which is under the charge of the plaintiff bank more particularly described in Schedule 'A' to the plaint, with running interest at the rate of 22.33% in all, from the date of the suit till its realisation. The suit against the respondent no.4 original defendant no.4 was ordered to be dismissed. The defendants no. 1 to 3 were ordered to pay the costs of the suit to the plaintiff and the defendant no.4 to bear its own costs. Hence the present appeal.

3. It may be stated that the respondents no.1 to 3 were ordered to be deleted in view of conditional order dated 3.12.1996 passed by this Court. Therefore, the question that arises for our consideration is whether the appellant bank is entitled to claim the decretal amount from respondent no.4 who stood guarantor of respondents no. 1 to 3. It is to be noted that the respondents no. 1 to 3, in fact, did not appear before the learned Trial Judge even though they were duly served with summons and, therefore, the suit was ordered to be proceeded ex-parte against them.

4. The brief facts leading to the present appeal are as under: (for the sake of convenience, the parties shall be referred as they are described in the suit i.e. the plaintiff and defendant no.4.)

The plaintiff has averred that the plaintiff bank is a Corporate body having its Head Office at Bombay and among its various branches, one branch is at Veraval and the said plaintiff bank is a nationalised bank. The plaintiff bank grants loan for various purposes to encourage industry, trade and business and from amongst various types of schemes for the purpose, one of them is loan under Fisheries Exports Scheme and the defendants

no. 1, 2 and 3 had applied for such loan and it was granted to defendants no. 1 to 4. The said loan was under the Shipping Loan Cash Credit Hypothecation Scheme. The defendant no.1 is a registered partnership firm and the defendants no. 2 and 3 are the partners of the said firm. The loan of Rs.4 lacs under the said Scheme was sanctioned by the plaintiff and the defendant no.4 had stood guarantor for such loan in favour of defendants no.1, 2 and 3. The defendants no. 1 to 3 executed documents in favour of the plaintiff bank. The documents which were executed by the defendants no. 1 to 3 were:

(1) The demand promissory note worth Rs. 4 lacs;
(2) Declaration of Partnership;
(3) Hypothecation agreement, the Agreement for joint and individual liability of defendants no. 1 to 3.

It was also averred by the plaintiff that the defendant no.3 had also executed equitable mortgage for his property situated in Veraval bearing EP No. 428 and 436 in favour of the plaintiff bank. The defendant no.4 had executed an agreement i.e. Letter of Guarantee in favour of the plaintiff and all those documents were executed by defendants no.1 to 4 on 21.12.1979 and they had put their signatures thereon. Thereafter, the defendants no. 1 to 3 received the loan of Rs. 4 lacs under the Scheme of Shipping Loan Cash Credit Hypothecation. The plaintiff further averred that the defendants no. 1 to 3 were bound to repay the loan regularly with running interest, namely 2% more than the prevailing rate, not less than 11% interest and the defendants no. 1,2 and 3 had to submit the stock statement regularly to the plaintiff bank and the defendants had to keep 25% margin over the hypothecation of goods and they were bound to submit Letter of Credit regularly and the lease of the Cold Storage was to be renewed from time to time by the defendant no.1 which was hired by the defendant no.1 for the storage of hypothecated goods. The defendants no. 1,2 and 3 had failed to fulfil the above mentioned requirements as per the averment of the plaintiff made in the plaint and the defendants no. 1 to 3 did not submit stock statements regularly and the Stock Register dated 3.6.1980 and 30.6.1980 was not correctly filled up and the goods shown in those Stock Register were false and there was more difference between the Stock Statements dated 28.6.1980 and 30.6.1980. In short, it was averred by the plaintiff that the defendants were not submitting Stock Statements correctly and also not maintaining properly. It was further averred by the plaintiff that during the period from 12.2.1980 to 2.6.1980, there were five shipments of goods and the last wheel was drawn for

Rs. 25,000/- from the Bombay branch of the plaintiff. But the said wheel was not adjusted at its Veraval branch. Not only that, but the Letter of Credit was not given in time and that the defendant had not kept 25% margin as per the conditions imposed by the plaintiff bank while advancing loan to the defendants no. 1 to 3 and as such, the defendants had violated terms and conditions of the loan agreement and the defendants had not repaid the loan amount to the plaintiff in spite of notices given to the defendants. The last notice was given on 5.9.1980 and the said notice was replied by the defendants no. 1 to 3, but the defendant no.4 had replied that he was discharged from the liablities. It was averred by the plaintiff that thereafter none of the defendants had taken care to repay the loan amount and hence the plaintiff filed the suit to recover an amount of Rs. 3,34,314.67 from the defendants with interest as well as penal interest and the commission charges which came to 22.33% and also prayed for the costs from the defendants. The plaintiff also prayed for directions to recover the amount from the property of defendant no.3 which is an equitable mortgage with the plaintiff bank.

5. The defendant no.4 appeared and filed his written statement at Ex.27 and resisted the plaintiff's suit inter alia contending that the plaintiff's suit was false and deserved to be dismissed. The defendant no.4 admitted that he had stood as a guarantor of the defendants no. 1, 2 and 3, but at the same time, he denied that he did not stand as a guarantor as averred by the plaintiff. He further stated that the plaintiff did not explain about the terms and conditions as well as the Scheme under which the loan was granted and denied to have executed any document on 21.12.1979 in favour of the plaintiff and further stated that the defendant no.4 does not know English language and without explaining him anything, the plaintiff obtained signature of defendant no.4. He further stated that he was misrepresented by the plaintiff for such guarantee and because of such misrepresentation, he stood as a surety for defendants no. 1, 2 and 3 and, therefore, he was not liable for any payment. At the same time, the defendant no.4 has denied the defendants no. 1 to 3 having received loan amount of Rs. 4 lacs or cash credit hypothecation loan. The defendant no.4 has further stated in the written statement that except notice dated 5.9.1980, no written or oral intimation was ever given to him in this regard and no demand was made and the plaintiff had made false averment in the plaint; that the defendant no.4 had signed the guarantee bond and other documents out of ignorance and that the plaintiff had got them signed by

keeping him in dark and as such, no liability can be fastened on him and as such, no cause of action had arisen on 21.12.1979, 13.7.1980 or on 5.9.1980 as well as on 1.7.1981 as averred by the plaintiff in the plaint. It was further stated by the defendant no.4 that as per the averment of the plaintiff in the plaint, there was violation of the terms and conditions of loan by the defendants no. 1,2 and 3 and it was known to the plaintiff. However, no effective steps were taken by the plaintiff against defendants no. 1,2 and 3 and, therefore, the defendant no.4 stood discharged as a surety and now he was not liable for any kind of payment to the plaintiff. It was further contended that there was a condition that the loan was to be advanced to the defendants no.1,2 and 3 on production of Letter of Credit to the plaintiff bank. However, the plaintiff bank had advanced the loan in absence of any such Letter of Credit and as such, the plaintiff had advanced loan to the defendants no. 1,2 and 3 in spite of breach of conditions of loan and as such the defendant no.4 was not liable for any payment and the suit was not tenable against him. It was also stated in para 14 of the written statement Ex. 17 that the loan was to be advanced only against ECGC Insurance and the defendants no.1,2 and 3 had committed breach of those terms which were first and foremost conditions for advancing such loan; that the loan was obtained from the plaintiff without production of ECGC Insurance coverage and the plaintiff had also not looked into the matter properly while advancing loan and in spite of violation of the ECGC coverage condition, the plaintiff had advanced the loan. It was further contended that without intimation to the defendant no.4, the plaintiff had advanced loan to the other defendants and this was a basic change or violation of the terms and conditions of the loan and, therefore, the defendant no.4 was not liable and the suit was not maintainable. It was also averred that the plaintiff bank had shown negligence and carelessness in payment of loan to the defendants no. 1,2 and 3 and for the said reason, the loan remained unpaid by the defendants no. 1,2 and 3 for which the defendant no.4 was not liable and the plaintiff had no right or cause of action arising to file the suit against the defendant no.4. The defendant no.4 ultimately prayed for special costs of Rs. 3000/- from the plaintiff and in the alternative, also prayed that in case if the Court decided to pass a decree against all the defendants, then he may be granted instalments for long term as well as for small amount.

From the pleadings of the parties, issues at Ex.

18 were framed by the trial court.

6. In the suit, the plaintiff bank had examined Mr. R.K.Hathi, the Manager of the bank at Ex. 39 while defendant no.4 has examined himself at Ex. 67.

7. After considering the oral as well as documentary evidence on record, the learned Trial Judge recorded a finding that the plaintiff has proved that the defendant no.1 had taken a loan of Rs. 4 lacs under Shipping Loan Cash Credit Hypothecation Scheme and the plaintiff bank is entitled to interest at the rate of 19.5% and penal interest at the rate of 2.75% and commission charges at the rate of 0.8%, in all 22.33% running interest from defendants no. 1 to 3 from the date of the suit till its realisation. The learned Trial Judge, however, recorded a specific finding that the defendant no.4 has proved that he stood discharged as a surety of defendants no. 1 to 3 as per his written statement at Ex. 17, though recorded a finding that the said defendant no.4 failed to prove that the Letter of Guarantee was taken under misrepresetnation. With the aforesaid findings, the learned Trial Judge passed the decree as prayed for by the plaintiff against the defendants no. 1 to 3. Hence the present appeal.

8. Mr.A.H.Mehta, learned Senior Counsel appearing for the appellant submitted that the trial court has committed an error in holding that there was breach of conditions of contract and negligence on the part of the plaintiff-bank as a result of which the guarantee given by defendant no.4 stood discharged and the defendant no.4 was not liable for the said guarantee. In the submission of learned Counsel, on true and correct interpretation of the word 'guarantee', the defendant no.4 cannot stand discharged from guarantee given by him having regard to the facts and circumstances of the case. The learned Counsel also submitted that various terms and conditions of the Letter of Guarantee Ex. 51 and in particular Condition No.3, if correctly interpreted, would mean that the defendant no.4 would be liable notwithstanding whether additional security ceased to exists or not.

9. Ms.Disha Nanavati, learned Counsel appearing for the respondent no.4 on the other hand, supported the judgment of the trial court in toto.

10. We have gone through the evidence of Mr. R.K.Hathi, the Branch Manager of the plaintiff bank as well as the evidence of Asandas Jethanand, defendant no.4 and other documentary evidence on record.

PW1 RK Hathi, Ex.39 has deposed that he was the Branch Manager of the plaintiff bank at Veraval during 1975 to 1981 and he knew defendants no. 2 and 3 who were the partners of defendant no.1, a registered partnership firm. According to him, the defendant no.4 stood as a guarantor for defendants no. 1 to 3. The defendants no. 1 to 3 had applied for loan in the year 1979 under the Shipping Loan Cash Credit Hypothecation Scheme and an amount of Rs. 4 lacs was sanctioned to them. The defendants no. 1 to 3 had executed promissory note Ex. 27 and also executed other documents Ex. 28 to 30 in favour of the plaintiff bank. According to him, the defendants no. 2 and 3 also executed a Letter of Continuity which is produced at Ex. 40. The defendant no.1 obtained a loan of Rs. 4 lacs on 4.12.1979. It is also clear that the defendants no. 2 and 3 were jointly and severally liable to pay interest on the said sum from 21.12.1979 at the rate of 11% p.a. Ex. 28 is the Hypothecation Deed executed by defendants no. 2 and 3 on the same day. Ex.29 is the declaration of partnership firm produced by defendants no. 2 and 3 and Ex. 30 is the Hypothecation Agreement. This witness has identified signatures of defendants no. 2 and 3. This witness also produced documents Ex. 41 to 47 and other documents.

In the cross examination, he has made certain admissions which corroborate and give support to the defence of defendant no.4, namely that because of the negligence of the bank, the goods hypothecated were allowed to perish without recovering instalments. We will refer to those admissions at an appropriate stage. However, the said witness has stated in the cross examination that it was a special type of advance under the Scheme floated by Reserve Bank of India and that the papers of the Scheme were in the custody of the bank. He has also stated that the advance was given under ECGC Scheme (Export Credit Guarantee Corporation) under which if the recovery of advance fails, then the ECGC has to pay major part of the loan amount and accordingly the bank had already made report to ECGC that the recovery had failed. The witness has also admitted that the advance was to be made only against the ECGC and the defendants no 2 and 3 were given to understand at the time of making payment of advance that such advance shall be made good by ECGC i.e. advance was secured by ECGC. The defendants no. 1 to 3 were also made to understand that the advance was only against hypothecation of goods and that the advance was secured against ECGC Scheme.

11. It is the case of defendant no.4 that as per the

provisions of Indian Contract Act, there was breach of conditions of contract and negligence on the part of the plaintiff bank and, therefore, the defendant no.4 deserves to be discharged as guarantor. In the evidence of Branch Manager Mr.RK Hathi, he has clearly admitted that the stock statements were not correctly sent. He has also admitted that inspection of the said transaction was made by the Head Office. However, he had to admit that he did not know as to what was the report made by the inspecting party of the plaintiff bank. He has admitted that no physical verification of these goods was made. Even though he has stated that the stock statements were false, still however, disbursement was made. From the evidence of Branch Manager Mr. Hathi, it is clear that the plaintiff bank had not acted as per Condition No. 10 of Ex. 30, the Hypothecation Agreement. In fact, Mr. Hathi has admitted in his deposition that the plaintiff bank had not acted as per Condition No.10. According to Mr. Hathi, after 30.6.1980, no payment was made to the defendants no. 2 and 3 and on that day, the amount of Rs. 4,11,045.75 was due to them. However, no steps were taken as per the provisions of Condition No.10 of Ex. 30. He has also admitted that there was no bar to sell or dispose of perishable goods as well as there was no bar to apply Condition No.10 in this regard. The witness has also admitted that looking to the behaviour of defendants no. 1 to 3, the bank had felt that more security must be obtained. However, no steps were taken. Ex. 25 which is an equitable mortgage document executed between the plaintiff bank and the defendants no. 2 and 3 subsequently is explained by this witness by stating that the bank found these two defendants irregular in making payment and, therefore, Ex. 25 was executed subsequently.

12. From the above admission of the plaintiff's own witness, it is clear beyond any manner of doubt that the plaintiff bank was wholly negligent in advancing the amount and had failed to recover instalments from defendants no. 1 to 3. In the circumstances, the defendant no.4, being not at fault, is not liable.

13. The trial Court, considering the aforesaid aspects, has rightly followed the decision rendered by Hon'ble Apex Court in the case of State Bank of Saurashtra Vs. Chittaranjan Rangnath, AIR 1980 SC 1528. In para 10 of the said decision, the Apex Court has held as under:

"The surety in good faith contracted to offer personal guarantee on the clear understanding

> that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor Bank. On this conclusion, S.141 of the Act will be indubitably attracted. S.141 comprehends a situation where the debtor has offered more than one security, one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of Sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by S.141."

14. Mr. Mehta, learned Counsel for the appellant tried to distinguish the said decision by contending that the case before the Apex Court was one where the Supreme Court was dealing with the case of pledge of goods where the goods were put in the custody of the creditor bank while the case on hand is the case of hypothecation of goods where the custody of the goods has always remained with the borrower i.e.defendants no. 1 to 3 and, therefore, the principle laid down in the said decision is not applicable to the facts of the present case.

15. As held by the Supreme Court in the said decision, the right of a surety against principal debtor is impaired by any action or inaction which implies negligence appearing from lack of supervision undertaken in the contract. The surety would be discharged under the combined operation of sections 139 and 141 of the Act. Thus, in the instant case, even though the agreement between the bank and the defendants no. 1 to 3 was for hypothecation of goods and the goods were in the custody of the said defendants, from the evidence on record, it is clear that the plaintiff bank was negligent in advancing and/or recovering the amount of instalments from the defendants and, therefore, the liability of the surety i.e. defendant no.4 stood discharged in view of provisions of sections 139 and 141 of the Contract Act.

16. In view of the above, we see no merit in this appeal. Needless to say that we are in total agreement with the reasonings and the ultimate conclusion recorded by the trial court.

17. In the result, the appeal fails and is dismissed.

No order as to costs.

(Kshitij R.Vyas,J.)

(K.S.Jhaveri,J.)

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